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Supreme Court of the United States

October Term, 1977

No. 77-102

DENNIS KEHN AND PETER MIHALIC,
Petitioners,

VS.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF OF RESPONDENTS IN OPPOSITION

JOHN T. CORRIGAN, *Prosecuting Attorney of Cuyahoga County, Ohio*

ALBIN LIPOLD
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario
Cleveland, Ohio 44113
216-623-7800
Attorneys for Respondent

JEFFREY W. LARGENT
JAMES M. KEHN
Suite 1308, 33 Public Square
Cleveland, Ohio 44113
216-771-4050
Attorneys for Petitioners

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

Objections to Jurisdiction 1

Counter Questions of Law 2

Statement of the Case 2

State's Evidence 4

Defense Evidence 26

Post Trial Proceedings 27

Reasons for Denying the Writ 29

1. A judgment will not be reversed because of misconduct of a juror, in making and use of notes, unless prejudice to the complaining party is shown 29
2. The *Chapman* rule applies only to the test of harmlessness when there is a constitutional error, and has no application in deciding whether such an error exists 33
3. Supreme Court Rule 40(1)(d)(2) which provides in part that, "Questions not presented according to [the requirements of this rule] will be disregarded, save as the Court, at its option, may notice a plain error not presented," does not apply to questions presented on a Petition for Writ of Certiorari since the entire trial record is not available to the Court for examination 34

Conclusion 37

TABLE OF AUTHORITIES

Cases

Chapman v. California, 386 U.S. 18 (1967) 2, 33
Cleveland, C.C. & St. L. Ry. Co. v. Ullom (1898), 20 Ohio C.C.R. 512 32
Parker v. Gladden, 385 U.S. 363 (1966) 29
State v. Adams, 141 Ohio St. 423 (1943) 31
State v. Childs, 14 Ohio St. 2d 56, 236 N.E.2d 545, *cert. den.* 394 U.S. 1002, 22 L. Ed. 2d 779, 89 S. Ct. 1596 33
State v. Davis, 44 Ohio App. 2d 335 33
State v. Jackson, 201 Kan. 795, 443 P.2d 279, *cert. den.* 394 U.S. 908, 21 L. Ed. 2d 219, 89 S. Ct. 1019 32
State v. Kehn, 50 Ohio St. 2d 11 ..... 32, 34, 36
State, ex rel. Hetzler v. Snyder, 63 Ohio L. Abs. 42 (1950) 32
Turner v. Louisiana, 379 U.S. 471 (1965) 29
Vachon v. New Hampshire, 414 U.S. 478 (1974) 34
W. H. Davis Die Co. v. Beltzhoover Electric Co. (1931), 40 Ohio App. 308 32
Wicker v. Cleveland, 150 Ohio St. 434 (1948) 32

Statutes and Rules

Federal Rules of Evidence:

Rule 101 35
Rule 403 35

Ohio Revised Code:

Section 2901.241 ..... 3, 4
Section 2907.10 ..... 3, 4
Section 2907.12 ..... 3, 4

Section 2907.20 ..... 3, 4
Section 2907.141(B) 3, 4
Section 2907.142 4
Section 2945.59 ..... 8, 35
Section 4549.04(A) 3, 4

Supreme Court Rule 40(1)(d)(2) 2, 34

Text

3 WEINSTEIN'S EVIDENCE, Section 607 35

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TO: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There is no substantial federal question which would require this Court to review this case.

The questions herein presented were all raised in the trial court, the Court of Appeals for Cuyahoga County, Ohio, and the Supreme Court of Ohio. The jury in the trial court found the petitioner Dennis Kehn guilty of 30 felonies and the petitioner Peter Mihalic guilty of 13 felonies. The Court of Appeals and the Supreme Court of Ohio both affirmed the judgments of the trial court.

The Ohio courts decided this case in accordance with the statutes and Constitution of the State of Ohio, and the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is therefore presented by the petition for certiorari.

COUNTER QUESTIONS OF LAW

1. A judgment will not be reversed because of misconduct of a juror, in making and use of notes, unless prejudice to the complaining party is shown.

2. The *Chapman* rule applies only to the test of harmlessness when there is a constitutional error, and has no application in deciding whether such an error exists.

3. Supreme Court Rule 40(1)(d)(2) which provides in part that, "Questions not presented according to [the requirements of this rule] will be disregarded, save as the Court, at its option, may notice a plain error not presented," does not apply to questions presented on a Petition for Writ of Certiorari since the entire trial record is not available to the Court for examination.

STATEMENT OF THE CASE

The petitioners, Dennis Kehn and Peter Mihalic were both indicted by the Grand Jury of Cuyahoga County on April 9, 1974. The indictment charged that both Dennis Kehn and Peter Mihalic did, along with a group of unindicted conspirators, commit thirty-two separate felonies. The unindicted conspirators named in the indictments were: Charles Broeckel, Philip Christopher, Paul Sharaba, Herman Holly, Michael Ryan, Al Panetta, William Whitcomb, Peter Sanzo, David Tiburzio and James Testa. Not

all of these men were alleged to have participated in each crime. However, Charles Broeckel and Philip Christopher were named in all thirty-two counts of the indictment.

Dennis Kehn and Peter Mihalic were both charged with committing the following crimes: (1) unlawful entry of financial institution, Ohio Revised Code, Section 2907.141(B) on March 28, 1971 of Cleveland Federal Savings & Loan Assn.; (2) burglary, Ohio Revised Code, Section 2907.10, and (3) larceny of a .38 caliber revolver and money of the value of $75 on June 14, 1971, Gale's Bi-Rite Super Market; (4) burglary, Ohio Revised Code, Section 2907.10; (5) forcing entry into safe, Ohio Revised Code, Section 2907.12, and (6) larceny of Eagle Stamps of the value of $913 and money of the value of $11,000, Ohio Revised Code, Section 2907.20, on June 17, 1971 of Pick-N-Pay Store No. 35, (7) burglary, Ohio Revised Code, Section 2907.10, (8) forcing entry into safe, Ohio Revised Code, Section 2907.12, and (9) larceny of jewelry of the value of $23,078.39, Ohio Revised Code, Section 2907.10, on June 27, 1971 of Alvin's Jewelers, Richard Schreibman, owner; (10) burglary, Ohio Revised Code, Section 2907.20, (11) larceny of men's clothing of the value of $20,855, Ohio Revised Code, Section 2907.10, of Sidney's Men's Wear on September 5, 1971; (12) auto stealing, Ohio Revised Code, Section 4549.04(A) 1962 Ford truck, the property of Silvio Panichi on September 5, 1971; (13) burglary, Ohio Revised Code, Section 2907.20, and (14) attempted entry into safe, Ohio Revised Code, Section 2907.12 on September 24, 1971 of Pick-N-Pay Super Market; (15) burglary, Ohio Revised Code, Section 2907.10, (16) forcing entry into safe and (17) larceny of $45,297.28, Ohio Revised Code, Section 2907.20, on December 20, 1971 of Uncle Bill's and aggravated assault, Ohio Revised Code, Section 2901.241, on December 20, 1971 of (18) Judith

Dressler, (19) David Kozlowski, (20) Charles McGrue, (21) Danny Skiljan and (22) Loretta Richards; (23) burglary, Ohio Revised Code, Section 2907.10, and (24) forcing entry into safe, Ohio Revised Code, Section 2907.12, on January 17, 1972 of Stakich Realty; (25) unlawful entry of financial institution, Ohio Revised Code, Section 2907.141(B), (26) larceny of financial institution $96,811.16, Ohio Revised Code, Section 2907.142 and (27) forcing entry into safe, Ohio Revised Code, Section 2907.12 of Superior Savings and Loan Association on January 17, 1972; (28) burglary, Ohio Revised Code, Section 2907.10, (29) forcing entry into safe, Ohio Revised Code, Section 2907.12, and (30) larceny of money $26,200, Ohio Revised Code, Section 2907.20 on March 7, 1972 of Cleveland Industrial Vending Co.; (31) aggravated assault, Ohio Revised Code, Section 2901.241, of Randall Keen on March 7, 1972; and (32) auto stealing, Ohio Revised Code, Section 4549.04(A), of 1971 Ford truck of Cleveland Industrial Vending Co. on March 7, 1972.

Trial to a jury commenced on June 18, 1974 as to both defendants. At the conclusion of the State's case, counts 1 to 9 and 13 to 22 were dismissed by the court as to Peter Mihalic only. On July 26, 1974 the jury returned its verdict finding Dennis Kehn guilty of 30 counts and not guilty of counts 2 and 3. The jury also found Peter Mihalic guilty of counts 10-12 and 23-32. The defendants were then sentenced as appears of record.

Upon appeal, both the Court of Appeals, Eighth Judicial District, and the Supreme Court of the State of Ohio, affirmed the judgment of the Common Pleas Court.

State's Evidence

A series of ten separate burglaries and/or break-ins, and related crimes, were committed in the far east side

of Cleveland, Ohio between March 28, 1971 and March 7, 1972. All of these crimes, with which both petitioners were charged, were committed in the Sixth Police District. These burglaries and other crimes were committed generally by a group of about five to six burglars and the help of either or both petitioners. The burglars were not always the same on each date. However, Charles Broeckel and Philip Christopher did participate in all of the crimes.

The petitioners, Lt. Peter Mihalic and Sgt. Dennis Kehn, were both policemen assigned to the same platoon, or shift, in the Sixth District. The majority of the crimes were committed while the two police officers were assigned to the third platoon and on every third month. The offenses relating to Stakich Realty and Superior Savings & Loan Association were committed on the day that both defendants were working the second platoon or shift. Each of the crimes were fully investigated by the Cleveland Police Department immediately after they were discovered without positive results.

Just prior to Christmas in 1973, Detective James P. Sweeney, Intelligence Unit of the Cleveland Police Department, received a letter from Charles Broeckel who was then serving time in the Chillicothe Correctional Institution in Ohio. As a result of receiving this letter, two agents of the F.B.I. and Detective Sweeney talked to Charles Broeckel about certain crimes and on or about January 4, 1974 Charles Broeckel first talked about some of the crimes in Cleveland, Ohio, that were committed with police help. On January 31, 1974 he made a statement listing each crime; he named his accomplices, and also detailed the participation in the crimes of two Cleveland Police Officers. He named Sgt. Dennis Kehn and Lt. Peter Mihalic.

As a result of the information obtained from Charles Broeckel, an investigation began anew into the unsolved crimes. The investigation was conducted by Sgt. Edward Kovacic, Det. James P. Sweeney and Det. Rocco Polutro, all three of the Intelligence Unit of the Cleveland Police Department (R. 1707).

For purposes of this statement of fact, the crimes will be listed in their order of occurrence.

Charles Broeckel testified that on March 28, 1971, he, Philip Christopher, and a group of other burglars made an entry into the Cleveland Federal Savings & Loan Assn., 18320 Euclid Avenue, Cleveland, Ohio, with the intent of taking out the safe. He testified that Sgt. Dennis Kehn was one of the burglars; that he, Dennis Kehn, sat in a police car in a parking lot above the bank overlooking Euclid Avenue. In this police car with defendant Kehn was another burglar who held a .45 caliber machine gun. Charles Broeckel testified that Sgt. Kehn ". . . was supposed to back off anybody that came in and he was supposed to reroute any cars that would come into the area, police. He was supposed to stay up there on the back and give us a watch." (R. 903-04). The machine gun was to be ". . . well, the purpose I explained was in case cars pulled in, because there was no way to get out of there; to spray the top of the area. . ." (R. 896-7).

Charles Broeckel testified that after making the entry and in testing the voltage in the alarm wires connected to the safe, that the alarm went off; the burglars scattered; Charles Broeckel and Philip Christopher ". . . went up the hill, got in the police car. . ." (R. 901) and were driven from the scene by Sgt. Kehn.

Patrolman William E. McGrath, one of the first police officers on the scene in response to the bank alarm at 4:14 a.m., was assigned to car 643 in Zone 643 where the bank was located. He testified that he met defendant Kehn earlier in his tour of duty and Kehn stated to him ". . . he (Kehn) would be up in the bowling alley parking lot (just above the bank) . . . he was going to meet . . . a girlfriend . . . there. . ." (R. 223). He also stated he, McGrath, did not go up into the parking lot above the bank that night because ". . . Sergeant Kehn said he was going to be up there. . ." (R. 229). Patrolman McGrath further testified that he did see a police car in the bowling alley parking lot that night at about 1:00 a.m. but he did not see who was in the police car. After receiving the bank alarm, Patrolman McGrath responded and stated that Sgt. Kehn arrived on the scene about five minutes later.

Charles Broeckel referred to the Cleveland Federal Savings & Loan Assn. as *Women's Federal* (R. 893-4). In Sgt. Kehn's duty report for the day he refers to the events as follows: "4:10 a.m. 18314 Euclid—Women's Federal Bank—Holdup alarm—responded along with 643 and 644—place entered—unlawful entry of financial institution." State's Exhibit No. 8 3/28/71 (R. 2328). The evidence showed that there was no Women's Federal in the entire Sixth Police District. Charles Broeckel also testified that he knew Dennis Kehn was one of the police who investigated the break-in because we told him to do so (R. 1090).

Charles Broeckel testified that the next burglary (mark), with assistance of the police, after Cleveland Federal Savings & Loan Association, was the Pick-N-Pay Store at the Euclid-Green Shopping Center on April 17, 1971. The evidence of this crime was offered under Ohio Revised

Code, Section 2945.59 *Proof of Defendant's Motive.* Prior to the burglary, Charles Broeckel talked with Dennis Kehn. Kehn said he had a partner whom he dealt with, Lt. Peter Mihalic (R. 911-12). He, Kehn, said that whatever money he would make, would be split with Peter Mihalic; if Kehn would not be there on the mark that Peter Mihalic would and vice versa. Charles Broeckel told Kehn that in relation to money they (the police) would get one end (R. 913):

> "A. End is equal end of whatever comes off the mark. If there is five of us and he made the sixth one, that would be six people. I said, I don't care if you have four people or one person or five people, you get one end, do with it what you want."

Charles Broeckel testified that on that particular burglary both Dennis Kehn and Peter Mihalic participated. However, the burglars were unsuccessful in opening the store safe because of improper torching.

The next burglary occurred at Gale's Bi-Rite Market, 709 East 185th Street, Cleveland, Ohio, on June 14, 1971. Prior to the burglary Charles Broeckel discussed same with Dennis Kehn and Philip Christopher at the Redwood Bar (R. 918) located on St. Clair Avenue near London Road. The bar was owned by Philip Christopher.

Charles Broeckel testified that Dennis Kehn was to meet the burglars on East 185th and he was going to use his police car, ". . . we were going to take the safe right out of there. . . His car was supposed to be parked on East 185th facing south . . . in case any call came over the radio, his recall lights came on and we came shooting out the back." (R. 919). While the burglars were getting ready to move the safe out of the building, the police recall lights came on. The police car proceeded

around the back of the building . . . Charles Broeckel, Philip Christopher and another burglar jumped into the police car which then sped off. Within minutes other police cars arrived to investigate the burglary.

Mr. James Valtman, who lived behind the store, saw a white truck near the store and two men enter the store at about 3:00 a.m. He then called the police. Sgt. Dennis Kehn later responded to the scene to investigate same. His duty report shows that immediately prior he was at a Society Bank alarm (R. 389-91) and a Gasco Station holdup. However, officers who investigated these matters testified that they could not recall Dennis Kehn being there (R. 1458-61).

Frank Yaris—victim of Gasco robbery—saw no sergeants or officers on scene to investigate robbery of which he was a victim (R. 783-4).

Stolen from Gale's Bi-Rite was a .28 caliber pistol and $75.

The next burglary occurred at the Pick-N-Pay Store No. 35 located in the Euclid-Green Shopping Center on June 17, 1971. This is the same store where the burglars failed to properly burn the safe open in April, 1971. Charles Broeckel testified that this burglary was pre-arranged and that he discussed it with Dennis Kehn at the Redwood Bar.

The burglars arrived at the scene at approximately 12:30 a.m. Dennis Kehn was to give the burglars an off from the parking lot (R. 928):

> "A. In other words, no cars could pull in that parking lot except one way. There is an entrance and there is an exit. There is a retaining, a small retaining wall and there is a bank in front. By the

time any car gets way back to where Pick-N-Pay would be it would take them 35, 40 seconds. The police car was up there. They could call us on the walkie and give us a warning."

Charles Broeckel testified that the burglars backed off twice; that Dennis Kehn got a call to go someplace and the burglars backed out the back door after they had jumped the alarm. When Dennis Kehn came back, ". . . he called us on the walkie. Then we went back in and finished burning the safe." (R. 929). Dennis Kehn's duty report for that night showed that he did respond to 16410 Euclid, a disturbance, along with car 644 at 1:35 a.m., also he responded to another disturbance at Olympia and Cliffview with car 644 at 1:35 a.m. (R. 2947, State's Exhibit No. 8, 6-17-71). Both places were within the immediate vicinity of the Euclid-Green Shopping Center. Taken from the safe in this burglary was $11,000.

The burglary of Alvin's Jewelers, 690 East 185th, Cleveland, Ohio, began on a Saturday night and continued into Sunday, a.m., June 27, 1971. Charles Broeckel testified that he discussed it with Dennis Kehn, Philip Christopher and the other fellows that were going on the mark (R. 940). These discussions took place, "at the Redwood out in the parking lot. Whenever I say the Redwood, it is not in the bar itself. It was always from earshot." (R. 941).

Prior to making entry into the jewelry store, the burglars were working on a bypass device of the ADT alarm on a telephone pole behind the store. The burglars were on the air with Dennis Kehn by walkie (R. 942). Charles Broeckel testified that it took about 1 1/2 hours to jump the alarm. Dennis Kehn ". . . had to be someplace on 185th within a three block radius." He was supposed

to, "Give us a call in case the alarm dropped while we were working on it. If we shorted it and it dropped he would get the call on his radio." He further testified that Dennis Kehn left shortly before they had the alarm jumped. The burglars then entered the building and proceeded to torch open the safe.

While the double door safe was being burned, a tear gas device was lit. Because of the gas, only part of the safe's contents were taken. The burglars planned to come back in the afternoon to get at the jeweler's safe that was inside the safe they torched open.

The burglary was discovered on Sunday evening by John A. Faris who lived behind the store when he saw a ground wire attached to his water faucet. The wire ran to the telephone pole where the burglar's ADT bypass device was found. The police were called at approximately 8:30 p.m.

The investigating police officers (R. 1560), detectives (R. 311) and superior officer (R. 1560) all discussed setting up a detail in the event the burglars decided to come back.

Charles Broeckel further testified that they started to come back on Sunday afternoon but people were swimming in an outside pool behind the store. He then called Dennis Kehn by phone at his home to find out if there was any kind of set upon the mark as they couldn't check it because of the people (R. 948). Later, Philip Christopher phoned Dennis Kehn and Dennis Kehn said he thought it was set up. So, the burglars backed off feeling that the burglary was probably discovered and the police were laying on it (R. 949). Detective Nick Stanic, and his partner, in response to a district assignment did give Alvin's Jewelry special attention, after the break-in was discovered (R. 211 and 213).

The value of the watches and jewelry actually taken amounted to $23,578.39.

The burglary of Sydney's Men's Wear, 18225 Euclid Avenue, was committed on September 5, 1971. The store was in the Euclid-Green Shopping Center. Charles Broeckel testified that the plans to burglarize Sydney's were made as follows (R. 962):

> "A. With Phil Christopher, myself, Al Pannetta, Michael Rayn, Herman Holley and Denny Kehn, and at that particular mark Denny Kehn wasn't going to be on. I don't recall what the reason was, whether he was on vacation, working in the office or what, but Pete Mihalic took his place."

The evidence shows that Dennis Kehn was assigned that night as officer in charge of the station located at East 152nd Street off of St. Clair Avenue, and that he began his tour of duty at 10:30 p.m. on September 4, 1971.

Charles Broeckel further testified that between the hours of 12:30 and 1:00 a.m., September 5th, the burglars jumped the alarm in back of the building with a battery by-pass; picked the lock on the front door. Peter Mihalic was on Euclid Avenue (R. 964):

> "A. Well, we had the police car with Peter Mihalic in it. He was placed right on Euclid Avenue, which would be to the left. If you were inside the place, it would be to the left toward the exit as you go out, and with a walkie-talkie. He had one of our walkies.
>
> Q. And what was Pete Mihalic supposed to be doing there?

> A. He was to back off any car or give us an off if a call came over the radio, if we were spotted by anybody."

After making their entry, the burglars filled a car and truck with merchandise. The burglars then backed off to steal another truck. They went to the 20th Century Lanes at 16525 Euclid Avenue, and stole a 1962 Ford panel truck, the property of Sylvio Panichi. This truck was then also loaded with stolen merchandise.

Charles Broeckel testified that during this period of time Peter Mihalic was on Euclid Avenue. He asked Peter Mihalic how he was going to explain the time. Peter Mihalic then lifted the hood of the police car and pulled the radiator hose off. He said he was going to call for a tow and figured it would take two hours to get there (R. 967).

The burglars finally left at about 5:30-6:00 a.m.; Peter Mihalic's car was still on Euclid Avenue near the exit of the shopping center (R. 968). The clothes were taken out to Eastlake and the stolen truck was found empty three days later in Willoughby, Ohio. The owner of the store testified that $27,000 in men's clothing was stolen.

Peter Mihalic's duty report for the night showed no special assignment. However, the report shows him to be in the vicinity of the Green Light Shopping Center from 3:25 a.m. on. At 4:30 a.m. his report shows in part, "18513 Euclid Avenue, radiator hose or hoses broken, car heating up, tow ordered. (6:00 a.m.) tow arrived . . ." (9/5/71—State's Exhibit No. 6, R. 2976.) The tow truck driver testified as to towing the car and the City of Cleveland work report authorizing repairs on his police car was introduced in evidence. (9/5/71—State's Exhibit No. 7 R. 2977.)

While the Sydney burglary was in progress, Patrolmen Rojc and Bozich drove into the shopping center at about 2:15 a.m. As they entered, Lt. Mihalic, their supervisor, drove up alongside of their car (R. 380). Patrolman Rojc stated that Peter Mihalic told them the shopping center checks OK (R. 364). The patrolmen then left on another radio assignment to an armed robbery at East 125th and St. Clair without checking the shopping center (R. 380).

William Henry, a paperboy who lived on the street next to the shopping center, testified that at 5:30 a.m. he saw some suspicious males on his street and a Cadillac auto of which he took the license plate number (R. 1412). This license plate listed out to Charles Broeckel (R. 1418-19).

The burglary of the Pick-N-Pay Super Market, 18501 Neff Road, occurred on September 24, 1971. Charles Broeckel testified that he and Philip Christopher made the plans for the burglary and that they discussed them with Dennis Kehn behind the Redwood (R. 974-5) in the back. ". . . Dennis Kehn was supposed to park in the parking lot by a pay telephone that sits in the parking lot right at the edge of it on Neff Road." (R. 976).

Pursuant to the plans, the burglars drove two cars on Bella Drive, walked between apartments to the rear of the Pick-N-Pay Store. They then proceeded to make their entry into the store by cutting through a corrugated metal ceiling. The alarm was cut away by use of a jumper wire (R. 978).

James and Judy Kosmerl resided on the third floor at 18901 Bella Drive. At approximately 1:00 a.m. Mrs. Kosmerl heard doors slam and saw a group of approximately six males going through her yard with tools. Two cars were parked directly in front of the apartment. James

Kosmerl called the police. Patrolman Candow and Patrolman Holbert arrived to investigate. While the patrolmen were on the scene Sgt. Dennis Kehn, their supervisor, also arrived on Bella Drive. Both officers testified that they saw and talked to Sgt. Kehn (R. 719 and 819). The patrolmen then parked in a driveway off Bella Drive to wait for the return of the males. They then received two other radio assignments and left the scene at about 2:00 a.m. One of the autos was listed to Glenda Cantwell, wife of Herman Holly, one of the burglars (R. 1783). For the other car there was no immediate listing, but it was later found to have been driven by Charles Broeckel (R. 1782).

Both Kosmerls testified that the two police cars arrived on the scene. The first being a stationwagon with the two patrolmen and the second a four-door sedan with one occupant. Charles Broeckel further testified that after jumping the alarm he received a call from Dennis Kehn on the walkie (R. 978):

> "A. He said come over by the car. So, I went over by the car and he said, there is a stakeout on your car. Somebody spotted your cars over there on Bella Drive. I don't know what it is about, but people over there. I am going to go check it. You better get out of here."

Charles Broeckel and the burglars left the area and went to the Redwood (R. 980):

> "Q. Okay. What happened then at the bar, if anything?
>
> A. We waited there for a while. Then, Denny came back. He told us there was a stakeout on the car and he would come back again and let us know what exactly was going on. In other words, he hadn't

found out—determined it yet whether it was still on. He didn't know why. Somebody called in the apartment building. They spotted some guys leaving through the yards.

Q. Who told you this?

A. Dennis Kehn.

Q. And then what happened?

A. He didn't know how long the stakeout was going to be for. So, we said we would wait there. So, he came back before closing time, I remember, and he said the stakeout is off. He said, in other words, they just laid on your cars for a while and it was supposed to be off."

Larry Sartain, the bartender of the Redwood drove Charles Broeckel to the area of the Pick-N-Pay store where the burglars again met with Dennis Kehn (R. 981). Larry Sartain said he saw Philip Christopher ". . . talking to a police car." (R. 773) at that time. The burglars then re-entered the store and proceeded to burn the safe. People began coming to the store and the burglars left without actually opening the safe.

The burglary of Uncle Bill's 16300 Lakeshore Boulevard, occurred on December 20, 1971. Charles Broeckel testified that the plans for this mark were made by himself, Philip Christopher and Dennis Kehn (R. 991-92):

"A. The plans were to go up there where the wires came off the phone pole and came down. They had conduit on a little space like that, before the concrete of the sidewalk. We were going to chop the wire there, pull a car up to the pole, chop the wire and then back off it, back off it and Denny Kehn would be within the first call on the radio distance where he would answer the call when the alarm went.

Q. And do you know where Dennis Kehn was supposed to be parked?

A. He was parked on 157th Street near the Stone Front Cafe."

Charles Broeckel testified that the alarm wire, outside and in front of the building, was cut with an ax. Dennis Kehn was in the first police car to respond. He was followed by Patrolmen Holbert and Candow. Dennis Kehn then returned to the Stone Front Cafe where he met Charles Broeckel and Philip Christopher (R. 994):

"A. We asked how many employees it was in there.

Q. What did he say?

A. He said they said three women and two guys.

Q. Okay.

A. They couldn't come out. They were locked in. He couldn't go in. He talked to them through a glass door. They said they had trouble with the alarm system before and they weren't going to call the manager and bother him. He would come in the morning and reset it."

Judith Dressler, one of the employees testified that the burglars made their entry into the store at 5:00 a.m. or a little later (R. 539). The entry was made by prying open an overhead corrugated door. The burglars were all hooded and armed. They rounded up the employees at gunpoint. They were two females, Judith Dressler and Loretta Richards, and three males, David Kozlowski, Danny Skiljan and Charles McGrue.

David Kozlowski was asked by one of the gunmen, "how many of us were in the store and I told him there were five of us and he said, three women, and I said no, there was only two women . . ." (R. 566).

Dennis Kehn made two separate reports in which he made reference to the original alarm at Uncle Bill's his investigation, and the number of employees in the building:

> ". . . On December 20, 1971 at 1:48 a.m. received a broadcast of telephone alarm, Uncle Bill's . . . responded . . . upon arrival checked the front doors and found same to be secure . . . 642 arrived moments later . . . I observed, through the most westerly door . . . two . . . males stocking shelves, knocked on the door, and the males came to the door. I questioned the males concerning the alarm. They informed me that they were unaware of the alarm and that nothing was wrong at Uncle Bill's. They further stated that there were three girls in the building working. . ." (State's Exhibit No. 4 and No. 5, R. 3071-2).

The burglars locked all five employees in the men's room and proceeded to burn open two safes. They took from Uncle Bill's $48,297.43 (R. 638).

The burglary of Stakich Realty Co., 804 East 185th Street, and entry into the Superior Savings and Loan Association, 798 East 185th Street, occurred on January 16-17, 1972. Both businesses were in the same building and abutted each other.

Charles Broeckel testified that he discussed this crime with Philip Christopher, Peter Mihalic, Dennis Kehn and four other burglars (R. 1012) at the Redwood Bar; that at approximately 8:00-8:30 p.m. on the night of the burglary that he and Philip Christopher went to the Superior Savings & Loan Association with the intent of picking the

front door lock. Dennis Kehn was parked in front of the LaSalle Theatre, diagonally across the street (R. 1015):

> "Q. And what was Dennis Kehn supposed to do by the theater?
>
> A. He was more or less blocking me talking to somebody over there and he was just giving us a general off. In other words, while we tried to pick it, the lock, because we intended to try to pick the lock earlier and test the alarm system and make it later."

Charles Broeckel further testified that it was a bitterly cold day, and he was unable to pick the lock. As a result, the lock on the rear door of Stakich Realty was vice gripped and entry made. At that time Dennis Kehn and Peter Mihalic were parked on East 185th Street about a half block from the bank (R. 1016-17):

> "Q. And what were they supposed to be doing out there while you were making your in?
>
> A. Well, originally, like I said, we were going to go in there to try to jump the alarm on it and they were giving us an off. In other words, the police radio, their radio, if we set it off they would have let us know on the walkie right away.
>
> Q. And did you see both Mihalic and Kehn out there?
>
> A. Positively. I handed them my walkie."

While in Stakich Realty the burglars banged open a small safe. In the basement they sledged the wall between the real estate office and bank. They then bypassed the bank burglar alarm. As to Peter Mihalic and Dennis Kehn, Charles Broeckel further testified that (R. 1022-3):

"A. Well, at that time it was running late. I don't remember the exact incident, I can't—positively. I know they were there later than they should have been and like they were overtime on their schedule, you know, or had to get in the office or their trick was over. I just don't recall. They left. We told them to go. We picked up the walkie from them.

Q. Do you know how long they stayed out there, approximately?

A. I can't say positively, but I would say around midnight, 12:30 maybe, that they left. Somewhere around there."

The burglars torched open the bank vault and inner safe. They took from Superior Savings & Loan Association the amount of $61,785 in cash and $25,020 in Travelers Checks (R. 1404).

Vitalija Bitkus, 781 East 185th Street, testified that on the night of the burglary, she looked out of her second floor window for her husband's car. ". . . I noticed there was a Cleveland Patrol car parked in front of the bank and it was late that night, because it was after 12:00." She further stated that the police car was a sedan and that it was there about an hour (R. 721). Her husband, Raymond R. Butkus, testified that he left Cleveland Heights after midnight to go home. When he arrived he also noticed a police car parked in front of the bank. He also stated it was the coldest day of the year (R. 726-8). Both Dennis Kehn and Peter Mihalic should have gone off duty at 10:30 p.m.

Dennis Kehn's duty report (1/17/72, State's Exhibit No. 25) (R. 3035) shows that he was at the LaSalle Theatre at 8:00 p.m. on January 16, 1972. He showed no other special assignment for the remainder of his tour of duty.

In addition his duty report indicated he was assigned to, "Sixth District, 630, Sector two." The numerals 630 can designate either a car number, call number or both. Lt. Cousino testified that he reported for duty at 11:00 p.m. on the 16th, a half hour after Dennis Kehn was supposed to have gone off of duty; that he normally drove car 630 but it was not available at that time so he drove another car (R. 2251-2). However, car 630 was used by Sgt. Malloy at 6:30 a.m. the following morning (R. 2254).

Peter Mihalic's own duty report (1/17/72, State's Exhibit No. 32) (R. 3042) shows him to be at the Slovenian Home, 6419 St. Clair Avenue at 4:50 p.m. on January 16, 1972; at the Cleveland Convention Center with the knowledge of Captain Shillat at 6:00 p.m.; again at the Slovenian Home at 7:30 p.m. and no special assignment thereafter. Sgt. Donovan who was in charge of the Slovenian Home detail, a testimonial for Mayor Perk, from 4:10 p.m. to 10:00 p.m., did not recall Lt. Mihalic to be there (R. 1477-8), nor did Ptl. Stigerald who was there from 7:00 p.m. to midnight (R. 1562-4). Captain Shillat testified that he gave no permission to Peter Mihalic to go to the Cleveland Convention Center which was outside of the Sixth District (R. 1495-7).

The burglary of Cleveland Industrial Vending Co., 485 East 140th Street, occurred on March 7, 1972. Charles Broeckel testified that he discussed this mark with Philip Christopher, Dennis Kehn and three other burglars. He stated that (R. 1032-3):

"A. We jumped the alarm out on the pole in the back of it and Pete Mihalic and Denny Kehn were in the corner of a gas station, little Gulf gas station on the corner of Westropp and 140th.

Q. What were Pete Mihalic and Denny Kehn supposed to do?

A. They were on the radio and back off any cars that they knew would come up in the area in case of anything.

Q. And do you recall what time you made your in?

A. It was late at night. It was like maybe 1:00 o'clock, 12:30, somewhere at that time."

The burglars made their entry at about 1:00 a.m.; went into the office and proceeded to burn open two safes. The money in the safes was mostly in coin. To take all the money the burglars stole one of the company refrigerator trucks. Prior to loading the truck, they received a call on the walkie that a truck was coming in. This call came from Peter Mihalic and Dennis Kehn in the police car (R. 1034). As a result of the call (R. 1035):

"A. We stopped working. It was a delivery truck, a guy that delivers donuts, and he had a key to come in the side door that we entered, that we had vice-gripped. He was in the back of the truck getting his donuts ready. He got them all like this and came in the side door. When he came to the door one of the guys opened the door right with him and he must have thought he turned the key in the lock because the lock wouldn't work and he comes walking in and we took him off.

Q. What do you mean, we took him off?

A. Tied him up and put the pistol on him."

The donut man who entered the door during the course of the burglary, and who was assaulted as herein referred to, was Randal Keen (R. 740).

The burglars then loaded up the truck and left. $26,-500 was taken (R. 651). On the same day, Albert Duncan of the Penn Central Railroad Police Department, found the Cleveland Industrial Vending Co. refrigerated truck abandoned on railroad property in the Collinwood Terminal. He found the ignition to be tampered with and in the truck were empty money bags and some coins scattered around (R. 1438-40).

The evidence further indicates that Peter Mihalic was one of the investigating officers who arrived on the scene shortly after the burglary was discovered. However, his duty report for the day was never located (R. 1746-7).

Defendant Kehn's duty report for the same day (3/7/72, State's Exhibit No. 9, R. 3051) indicates that at 11:25 p.m. he "conferred with 602 concerning the victim of robbery at 647 Lakeview—advised armed robbery report . . ." However, the police officer, William Salupo, who investigated the robbery stated he could not recall Dennis Kehn, or any other police car, responding to the scene (R. 1514-15). The balance of defendant Kehn's report shows no special assignment.

Charles Broeckel further testified that the payoff to the two policemen was made to Dennis Kehn at the home of Philip Christopher and in coin (R. 1037-8). A photocopy of a deposit slip, dated 5/25/72, State's Exhibit No. 10, shows $140 in coin deposited to the checking account of Dennis Kehn in the Cleveland Trust Co. Similarly, a photocopy of a deposit slip, dated 7/13/72, State's Exhibit No. 12, shows $102 in coin deposited to the joint checking account of Peter Mihalic and Joan M. Noble at the Society National Bank. These two exhibits were admitted into evidence without objection on behalf of either defendant (R. 1816).

Sgt. Edward Kovacic of the Intelligence Unit of the Cleveland Police Department testified that on June 22, 1972, pursuant to a search warrant, that he participated in the search of Philip Christopher's home at 897 Rudyard Avenue and that they found (R. 1758):

> "A. We found ADT boxes, various parts of ADT alarms, what we call jumper wires. Wires that are used to bypass alarms, clips, wires, tools of all sorts, drills, motors, hydraulic jacks, a .38 and papers."

Among the papers found was an address book (State's Exhibit No. 18). In the book was the name "Denny the Cop" and the phone No. 531-2407 (R. 1788). The phone number was listed to the defendant, Dennis Kehn, at his address 19560 Ormiston. Also in the book were the names and phone numbers of Charles Broeckel, Mario Durant, Emil Dinzio, Herman Holly, Al Panetta, Mike Ryan, Al Walch, and the Redwood. All of these names were testified to as being fellow burglars of Charles Broeckel.

Also found in the search of Philip Christopher's home was a piece of paper with the printing of Alvin's Jewelers and certain alarm information thereto (R. 1763—State's Exhibit No. 16).

Evidence was introduced to show that defendant Peter Mihalic deposited into his personal checking account at Central National Bank the amounts of $5,557 in 1971, $10,-680.09 in 1972, and $12,577.85 in 1973 (R. 1651); that in 1972 and 1973 his deposits exceeded his take-home pay (R. 1644). Also, that he had a joint checking account with Joan M. Noble, a woman not his wife, from October, 1971 to the time of trial at the Society National Bank (R. 1663). Further, that on October 29, 1972, he purchased a 1971 Cadillac for $6,100 in cash (R. 1637-8).

As to Sgt. Dennis Kehn, records were introduced to show that his Cleveland Police Department Credit Union Savings Account increased from a low of $44.98 (R. 1684) in 1971 to a high of $7,792.79 (R. 1693) in 1973. Also, that his wife purchased a 1971 Oldsmobile on September 29, 1972 (R. 1639-41). The purchase price was $4,000.

Larry Sartain, the bartender at the Redwood, testified that he knew both Dennis Kehn and Peter Mihalic as policemen; that he saw Dennis Kehn in the Redwood a couple of times both in and out of uniform, and that he saw Peter Mihalic in the bar once in uniform. He further testified that he knew Charles Broeckel and all of the other unindicted co-conspirators individually and either personally or as patrons of the Redwood (R. 769-77).

Detective Viola (R. 146) and Sgt. Vanyo (R. 658) testified that they had observed all of the unindicted co-conspirators at the Redwood Tavern over a period of time and that they were known to frequent the tavern.

Capt. Joseph F. Mengel, Sixth District Platoon Commander and direct supervising officer of Dennis Kehn and Peter Mihalic testified that normally officers, lieutenants and captains, drove four-door sedans and that patrolmen normally drove station wagons (R. 469). He further testified that officers were not required to sign out for any particular car nor were they required to check in to show that they returned a certain car to the district; that no one would question what car they took. He further stated that it was a common practice that quite a few officers had made their own keys for various cars (R. 470-71).

Generally, the officers of the Sixth Police District rode separate cars and were assigned separate areas to cover. Capt. Charles Mauk, also assigned to the Sixth District knew both defendants and worked the platoon

that followed theirs in 1971 as a Lieutenant. During that year he saw Dennis Kehn and Peter Mihalic come in together after their tour of duty, in the same car, later than usual on two, three or four occasions (R. 1540-41).

Ptl. Richard M. Tanski, a member of the police department for seventeen years was assigned to the Sixth District from 1967 to 1973 and worked the same platoon as Peter Mihalic and Dennis Kehn. He testified that on certain occasions he did see Dennis Kehn and Peter Mihalic leave the station together in the same car. Dennis Kehn would park his supervisory car in the parking lot where civilian cars were parked and leave with Lt. Peter Mihalic. This would occur during the third shift, two or three hours after roll call. He further testified that while Dennis Kehn was officer in charge of the station he, Dennis Kehn, left the building on occasion a few hours after roll call and someone else would come in for a period of time (R. 1618-21).

Defense Evidence

Both petitioners presented evidence on their own behalf. Twenty-two witnesses testified in behalf of Dennis Kehn and twelve witnesses were called in behalf of Peter Mihalic.

Dennis Kehn testified that he did patronize the Redwood Bar in and out of uniform (R. 2285-6); that he knew Philip Christopher, Paul Sharaba and Pete Sanzo; and that he also knew Charles Broeckel in 1970, 1971 and 1972 (R. 2402). He also testified that during that period of time he had no other employment.

Peter Mihalic testified that he had been to the Redwood once; that he knew Philip Christopher but did not know Charles Broeckel; that he earned extra income helping to collect paper and junk but he had no income tax or other records to substantiate same; and that when he purchased the Cadillac for $6,100 in cash it was from money he had on hand at home (R. 2617).

Post Trial Proceedings

The jury returned its verdict on July 26, 1974. On August 5, 1974 the jury foreman, Anthony Parete, sent to the trial judge a small spiral notebook (Court's Exhibit No. 2), a series of legal cap sheets (Court's Exhibit No. 3), a single legal cap sheet (Court's Exhibit No. 4), and an accompanying letter (Court's Exhibit No. 5) explaining the enclosures. On August 19, 1974, all of the jurors were examined by the court individually, in the presence of counsel for all sides, in relation to these exhibits, "to inquire into just exactly what extent or to what extent these particular paper writings were involved in the jury's deliberations." (St. Supp. Tr. 5).

The foreman stated he took notes daily outside of the courtroom (St. Supp. Tr. 17). He explained the use of the notebook as follows (St. Supp. Tr. 11):

> "THE COURT: Okay. Now, going back to these again. What use was made of this black book which we are calling the notebook or the daily diary in the jury room. How was it used?
>
> MR. PARETE: Mostly just for my own recollection and then there was a question as to something that I happened would refer to it, but only with the strictest understanding that I would be open to correction or addition or what was there was not to be considered as definite; because the only definite thing would have been the transcript from the trial, and

if you do examine the books sometimes it just a general—like somebody's name and then just: Gave account of break-in.

I don't quote him, I didn't put down any facts. It was just the fact that this person could be pinpointed to a certain crime by way of being a witness."

The legal cap sheets was a chart system of all the crimes, prepared by the foreman after discussion with the other jurors during deliberation. "I either added or deleted or put down what they considered to be most important thing" (St. Supp. Tr. 10).

The single legal cap sheet (legal concepts) Mr. Parete said ". . . That was mostly for me." (St. Supp. Tr. 10, 14 and 22-3).

The letter sent to the court (Court's Exhibit 5), basically states the same as to which Mr. Parete testified in relation to the notebook and other sheets of paper.

Each of the jurors was asked individually, and not in the presence of the other jurors, to what effect, if any, did the notebook or these papers or the use thereof have on their verdict. Each juror answered, "none whatsoever," or words of similar import (St. Supp. Tr. 46-67).

REASONS FOR DENYING THE WRIT

1. A judgment will not be reversed because of misconduct of a juror, in making and use of notes, unless prejudice to the complaining party is shown.

The question presented by petitioners in regards juror note taking is not one of constitutional dimension. The cases cited by petitioners, *Turner v. Louisiana*, 379 U.S. 471-473 (1965) and *Parker v. Gladden*, 385 U.S. 363, 366 (1966), indicate a factual situation wherein there are direct outside or external influences by persons (two deputy sheriffs and a bailiff) exerted upon the jury.

In the case now before this Court, the facts show that at the commencement of the trial, after the jurors had been sworn, and prior to the taking of any evidence the jurors were told by the court in part as follows (R. 97):

"You are not permitted to take notes or ask any questions during the course of trial. Therefore, again, you can see that it is vitally important that you pay strict attention."

Petitioners state in their brief that the court repeatedly told the members of the jury that they could not take notes during the trial. This is not so. On at least sixty-three separate occasions during the trial, prior to recesses and evening adjournments, the court talked to the jury (R. 107, 135, etc.). On not one of those occasions did the court in any manner refer to note taking or admonish the jurors in regards thereto.

The one juror, who took notes, did so either at home or on the bus ride home from the courthouse. The notes

were not made in the courtroom (SR. 17-18). Subsequent to the trial, the court called the juror who had volunteered the information about the notes and inquired as to time and method whereby the notes were prepared as well as to what extent the material was used during the jury's deliberations. The court also called each of the other members of the jury in an effort to determine what effect, if any, the notes had on the decision reached by each juror individually (R. 45-66).

The Court of Appeals in commenting on the trial court's procedure, stated at page 20 of its opinion:

> "From our review of the supplemental transcript of proceedings, we conclude that the use in the jury room of the notebook and sheets listing the testimony relating to each crime did not prejudice the appellants. The record fails to disclose that Parete himself made some *effective* use of the notes during the deliberations or was able to use them in such a way as to persuade his peers. As noted previously, each of the other eleven jurors testified under oath that they reached their individual verdicts independent of the notes in question.
>
> "We also conclude that the presence in the jury room of the paper containing the legal concepts and definitions did not operate to the prejudice of the appellants. There is nothing in the record to indicate that the jurors relied on this information, and it is indeed highly unlikely that they did, given the fact that the court's written instructions were in the jury's possession during their deliberations (R. 2916) and given the court's final instruction to the jury that they should '. . . apply the written instructions in all instances' (R. 2918)."

At pages 16 and 17 of the Court of Appeals decision, it held:

> "It is well settled that the denial of a motion for a new trial based upon the misconduct of a juror will not be reversed on appeal absent a showing that the trial court abused its discretion. *Pearson v. Gardner Cartage Co.* (1947), 148 Ohio St. 425; *Maggio v. Cleveland* (1949), 151 Ohio St. 136, 144; *Weaver v. Gale* (App. 1949), 56 Ohio Law Abs. 178. In addition, it is established that absent a showing of prejudice to the complaining party, a judgment will not be reversed because of the misconduct of a juror. *Armleder v. Lieberman* (1877), 33 Ohio St. 77. Thus despite the misconduct of one juror, a case may nevertheless be free of prejudicial error when the remaining jurors indicate that they were not influenced by anything that the one juror might have done. *Cleveland Ry. Co. v. Haycox* (App. 1923), 1 Ohio L. Abs. 330."

As to evidence aliunde, it is well established that the verdict of the jury may not be impeached by the testimony of the jurors who rendered the verdict unless there is evidence aliunde impeaching the verdict.

In *State v. Adams,* 141 Ohio St. 423 (1943), the court states on page 427:

> "The so-called *aliunde* rule, generally recognized by the courts since the day of Lord Mansfield who is supposed to have first announced it in the case of *Vaise v. Delaval,* 1 T.R., 11 (K.B.), 99 Engl. Rep. R., 944, is to the effect that the verdict of a jury may not be impeached by the evidence of a member of the jury unless foundation for the introduction of such evidence is first laid by competent evi-

dence *aliunde*, i.e., by evidence from some other source. . ."

Also see, *Wicker v. Cleveland*, 150 Ohio St. 434 (1948) and *State, ex rel. Hetzler v. Snyder*, 63 Ohio L. Abs. 42 (1950).

The Court of Appeals held that ". . . The evidence presented to the trial court was not evidence aliunde of juror misconduct and, furthermore, assuming the evidence was properly receivable to impeach the jury's verdict, there was no showing that the taking and using of the notes by the jury prejudiced appellants' case in any manner."

The Supreme Court of the State of Ohio in this case, *State v. Kehn*, 50 Ohio St. 2d 11 at pp. 18 and 19 held that there was evidence aliunde but that no prejudice to appellants was affirmatively demonstrated.

In Ohio, the making and use of trial notes by a juror may not constitute misconduct and in certain instances may be desirable. *W. H. Davis Die Co. v. Beltzhoover Electric Co.* (1931), 40 Ohio App. 308; *Cleveland, C.C. & St. L. Ry. Co. v. Ullom* (1898), 20 Ohio C.C.R. 512.

In the recent case of *State v. Jackson*, 201 Kan. 795, 443 P.2d 279, *cert. den.* 394 U.S. 908, 21 L. Ed. 2d 219, 89 S. Ct. 1019, it was held that whether jurors should, or should not, take notes is within the sound discretion of the court, and it is not error per se for a juror to take notes, nor is it misconduct which peremptorily requires granting of a new trial, particularly where no showing is made that defendant's rights were prejudiced.

2. The Chapman rule applies only to the test of harmlessness when there is a constitutional error, and has no application in deciding whether such an error exists.

In the case of *State v. Childs*, 14 Ohio St. 2d 56, 236 N.E.2d 545, *cert. den.* 394 U.S. 1002, 22 L. Ed. 2d 779, 89 S. Ct. 1596, the court held in part ". . . He then suggests that the *possibility* of prejudice is enough to require reversal, and for the support of this assertion he relies upon *Chapman v. California*, 386 U.S. 18, which holds that a constitutional error in criminal cases must be harmless beyond a reasonable doubt in order to be considered harmless. This reliance is misplaced. The *Chapman* rule applies only to the test of harmlessness when there is a constitutional error, and has no application in deciding whether such an error exists. There is no established per se constitutional error here."

The taking and use of notes by a juror does not of itself constitute constitutional error

In the case of non-constitutional error, the State appellate courts determine whether or not there was "substantial" evidence of appellant's guilt before it affirms or reverses the judgment of the trial court. *State v. Davis*, 44 Ohio App. 2d 335.

3. Supreme Court Rule 40(1)(d)(2) which provides in part that, "Questions not presented according to [the requirements of this rule] will be disregarded, save as the Court, at its option, may notice a plain error not presented," does not apply to questions presented on a Petition for Writ of Certiorari since the entire trial record is not available to the Court for examination.

Petitioners concede that they did not raise below the constitutional questions asserted in their third question presented for review. They contend, in part, that the trial court's plain error is open to review by this Court under the rationale of *Vachon v. New Hampshire*, 414 U.S. 478 (1974). In *Vachon* this Court stated at p. 479 as to rule 40(1)(d)(2) that ". . . Questions not presented according to [the requirements of this rule] will be disregarded, save as the Court, at its option, may notice a plain error not presented. . ." This assumes of course that the Court has already accepted jurisdiction. The rule is not applicable on a petition for certiorari.

In one of the two factual situations, James Zimmerman was called in behalf of petitioner Peter Mihalic and would have testified that at a particular bar Charles Broeckel did say to him that "these two guys (Peter Mihalic in uniform and an unidentified sergeant in uniform) are no good rotten SOB's or something to that effect." (R. 2783).

The State objected to this testimony because a proper foundation was not laid on cross-examination of Charles Broeckel. The defense contended the testimony to be admissible to show bias or prejudice. The Ohio Supreme Court in *State v. Kehn, supra,* held at p. 19: "The Court of Appeals concluded that this error was harmless beyond a reasonable doubt. After careful consideration, we agree. . ."

Petitioners argue that Zimmerman should have been allowed to testify under the rationale of 3 WEINSTEIN'S EVIDENCE, Section 607 [OS]. This section refers to trials in federal courts and in particular to Federal Rule of Evidence 403, and the federal court decisions thereunder. Federal Rule of Evidence 101, however, provides that the "rules govern proceedings in the courts of the United States . . ." and not in State courts.

In regards the second factual situation, defense witness Al Pannetta was named as an unindicted co-conspirator on the following burglaries: Cleveland Federal Savings & Loan, 3/28/71; Gale's Bi-Rite, 6/14/71; Pick-N-Pay Store 35, 6/17/71; Alvin's Jewelers, 6/27/71; Sydney's Men's Wear, 9/5/71, and Pick-N-Pay, Neff Road, 9/24/71. In addition Charles Broeckel testified that Al Pannetta also participated in the burglary of the Pick-N-Pay Store on 4/17/71, evidence of which was offered under Ohio Revised Code, Section 2945.59 *Proof of defendant's motive.*

During the trial, Charles Broeckel testified that he was not sure, or could not recall if Al Pannetta did in fact participate in the Cleveland Federal Savings & Loan break-in (R. 1126 and 1228-9). Al Pannetta did not testify at the trial.

Defense counsel for Dennis Kehn attempted to introduce records of the Penn Central Railroad to show that Al Pannetta's (an employee), handwriting appeared on the railroad records that were made on the days of 3/28/71 (Cleveland Federal Savings & Loan), 4/17/71 (Pick-N-Pay—sim. act) and 6/17/71 (Pick-N-Pay #35) at or about the time these crimes took place. The attempt to offer this evidence was through fellow employees who stated they were familiar with Al Pannetta's handwriting.

The trial court in not allowing the records into evidence stated in part (R. 1983-4) that ". . . The purpose of this line of inquiry . . . is to impeach the testimony of the State's witness Broeckel as to the whereabouts of a Mr. Pannetta on certain dates and at certain times. The Court is of the mind that this would be to impeach the witness on collateral matters. We have, of course, to also consider the best evidence rule which would require the testimony of Mr. Pannetta either in person or on deposition. . . In the last analysis, assuming the receipt into evidence of this evidence, it would be for the purpose and could only be for the purpose of showing that certain trains entered and left, apparently, the Collinwood Yard of the Penn Central Railroad on the times indicated in those paper writings. . ."

The Supreme Court of Ohio agreed with the trial court, *State v. Kehn, supra,* at page 17:

> "However, the evidence was correctly excluded because it would have created a dispute about extraneous or collateral matters, *i. e.*, Pannetta's participation. Kehn and Mihalic were on trial, not Pannetta, and the court, by excluding the testimony, avoided the dangers of surprise, jury confusion and wasted time which are the reasons for the rule against impeachment on collateral matters.
>
> The trial court's exercise of discretion involved the weighing of the probative value of the offered evidence against its potential misuse by the jury. No abuse of discretion is evident, and this proposition of law is accordingly overruled."

CONCLUSION

We respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JOHN T. CORRIGAN, *Prosecuting Attorney of Cuyahoga County, Ohio*

By: ALBIN LIPOLD
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario
Cleveland, Ohio 44113
216-623-7800
Attorneys for Respondent